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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 231

THE ALTON RAILROAD COMPANY,
Appellant,

vs.

ILLINOIS COMMERCE COMMISSION, MOULDING-BROWNELL CORPORATION AND E. HELDMAIER, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

SILAS H. STRAWN,
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SUPREME COURT OF ILLINOIS

No. 231

THE ALTON RAILROAD COMPANY,
Petitioner,

vs.

ILLINOIS COMMERCE COMMISSION, EX REL., MOULDING-BROWNELL CORPORATION ET AL.,
Respondents.

STATEMENT BY PETITIONER OF BASIS ON WHICH THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE FINAL JUDGMENT OR ORDER ENTERED HEREIN.

Now comes The Alton Railroad Company, petitioner herein, and presents this statement of the basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment or order entered herein on April 20, 1938.

(1) In this suit petitioner sought to reverse and set aside an order (R. 6) made by the Illinois Commerce Commission (hereinafter called the "Commission") on March 24, 1937, in two proceedings before it, known as its Docket No. 22201, *Moulding-Brownell Corporation and E. Heldmaier, Inc.*, v. *The Alton Railroad Company et al.*, and its Docket No. 24391, *Petition of The Alton Railroad Company for an order authorizing the discontinuance of service, etc.* The two cases were consolidated for hearing and decision

by the Commission, and presented the question whether petitioner should be permitted to discontinue the rendering of service over a certain switch track in the City of Chicago in the absence of the payment by the industries served by the track of the cost of its maintenance and of fees charged under ordinance of the City of Chicago for the maintenance of the track over public streets and alleys in said city (R. 25). The track involved was not built by petitioner, is not owned by it and is not located upon property owned by it.

From 1904 until 1924 the costs of maintaining the track were borne by petitioner, under agreement with the industries served by the track, and the ordinance charges of the City of Chicago were paid by the industries. Upon the expiration of that agreement, petitioner and the industries served by the track became involved in a controversy as to who should bear the future cost of maintenance and the payments to the City of Chicago. During that controversy, the charges were paid by petitioner, and the controversy culminated in the filing of the petitions. The Commission made an order in the cases on October 28, 1936 (R. 583), but granted a rehearing on petitioner's petition therefor (R. 596), and thereafter made its order of March 24, 1937.

That order required petitioner to continue to expend its funds in the maintenance and operation of the track involved (R. 30), denied the application of petitioner for authority to discontinue operation over the track (R. 30), and found that the power of the City of Chicago to impose a charge for the maintenance of the track over city streets was not before it and that no order on that point was necessary (R. 22, 23, 25). On April 14, 1937, petitioner appealed the order of the Commission to the Circuit Court of Cook County (R. 3, 720) as permitted by Illinois statute (Ill. Rev. Stat. 1937, Ch. 111 2/3, Sec. 72, p. 2497), and on October 9, 1937, an order was entered in that court (R. 758), affirm-

ing the order of the Commission without opinion. Petitioner filed a petition for a new trial or rehearing in the Circuit Court of Cook County (R. 753, 754) and upon the denial of this motion (R. 756), appealed from the decision of that court to the Supreme Court of Illinois, which is the highest court of the State (R. 760. See Ill. Rev. Stat. 1937, Ch. 111 2/3, Sec. 73, p. 2498). The Supreme Court of Illinois, on April 20, 1938, affirmed the order of the Circuit Court, sustaining the order of the Commission, and on June 15, 1938 entered an order denying petitioner's petition for a rehearing.

(2) The jurisdiction of the Supreme Court of the United States to review said judgment or order on appeal is sustained by the following statutory provisions: Section 237 of the Judicial Code (28 U. S. C. A. Sec. 344) provides in part as follows:

> "A final judgment or decree in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

By amendment of January 31, 1928, to the Judicial Code, the writ of error was abolished, and it was provided that all relief, which theretofore could be obtained by writ of error, should be obtainable by appeal (28 U. S. C. A., Sec. 861a). By another amendment of April 26, 1928 (28 U. S. C. A. Sec. 861b), it was provided that the statutory provisions relating to writs of error should be applicable to appeal.

(3) The judgment or order sought to be reviewed upon this appeal was made and entered on April 20, 1938, and petitioner's petition for rehearing was denied on June 15, 1938. The petition for appeal herein, together with an assignment of errors, was presented and the order allowing the appeal was entered on July 1, 1938. The Judicial Code (28 U. S. C. A., Sec. 350) provides in part as follows:

> "No writ of error, appeal or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, except that writs of certiorari to the Supreme Court of the Philippines may be granted where application therefor is made within six months."

(4) Petitioner asserts that the order of the Commission, made on March 24, 1937, and upheld by the Supreme Court of Illinois, deprives it of its property without due process of law in violation of its rights under the Fourteenth Amendment to the Constitution of the United States. That order requires petitioner to assume an obligation of ownership by expending its money in the maintenance of railroad track not constructed by petitioner, not owned by it, and not located upon property owned by it, but does not hold that under Illinois law the track belongs to petitioner or that petitioner may exercise with respect to it all rights deriving from ownership.

The petition filed with the Commission by petitioner alleged (R. 237) that petitioner does not own the track involved or the land upon which that track is located. The order of the Commission assumed that the facts in the consolidated case are as alleged in the petition filed with it by petitioner (R. 15), and specifically finds that the track involved was constructed by parties other than petitioner, upon property not owned by petitioner (R. 25).

The claim of the violation of petitioner's constitutional rights under the order of the Commission was made in the motion for a new trial or rehearing, filed in the Circuit Court of Cook County (R. 753), which was the first occasion upon which the claim could be made under the statutory procedure relating to appeals from orders of the Commission. It was not dealt with in any opinion of the Circuit Court, since that Court wrote no opinion and only entered an order affirming the order of the Commission (R. 758). Nor was it dealt with in the order of the Circuit Court denying petitioner's motion for a new trial or rehearing, as that order did nothing more than deny the motion (R. 76).

The claim was also made upon the appeal to the Supreme Court of Illinois, it being asserted in the Statement of Errors contained in petitioner's brief filed with that Court (p. 17) that

> "the Trial Court erred in failing to find that the order of the Illinois Commerce Commission, made in its Dockets Nos. 22201 and 24391, on March 24, 1937, constituted a taking of appellant's property without due process of law in violation of its rights under * * * the Fourteenth Amendment to the Constitution of the United States."

Under the practice in Illinois, no assignment of errors is filed with the Supreme Court of Illinois and included in the record of any case, these assignments being replaced by a statement of errors which is incorporated in appellant's brief.

The claim was passed upon by the Supreme Court of Illinois in its opinion delivered on April 20, 1938, the last paragraph of which reads as follows:

> "The order of the Illinois Commerce Commission was within its statutory power and does not violate any provisions of the State or Federal Constitutions."

(5) The constitutional grounds upon which this appeal is based are substantial in character, in that there is no decision of this Court sustaining any such order of a state administrative body under the circumstances obtaining in this case. On the contrary, the decisions of this Court indicate that a railroad must own a switch track before it can be required to assume an obligation of ownership, such as the maintenance thereof.

In *Union Lime Co.* v. *Chicago & Northwestern Ry. Co.*, 233 U. S. 211, it appeared that under the law of Wisconsin the track there involved would, after its construction, be owned by the Railway Company, it being stated by this Court (p. 222) that there is a clear distinction between spurs, which are owned and operated by a common carrier as a part of its system and under its public obligation, and merely private sidings.

In *Chicago & Northwestern Railway Co.* v. *Ochs*, 249 U. S. 416, this Court said (p. 419) that under the law of Minnesota, the track there involved, when constructed, would become the property of the railroad company and an integral part of its railroad system, and be wholly under its control. In *L. E. & W. R. Co.* v. *Public Utilities Commission*, 249 U. S. 422, this Court said (p. 425) that when the track there involved was restored, the railroad company would own it and be entitled to make a reasonable charge for its use.

In this case, there is no holding or suggestion that the track involved belongs to petitioner. With the consent of the industries served by the track, the owner thereof could remove it at any time, thereby depriving petitioner of the right to use it and any amounts spent in the maintenance or replacement thereof.

(6) Cases which sustain the jurisdiction of the Supreme Court of the United States, to review the said judgment

or order of the Supreme Court of the State of Illinois, are as follows:

Wadley Southern R. Co. v. *Georgia*, 235 U. S. 651, 660, 661;

L. E. & W. R. Co. v. *Public Utilities Commission*, 249 U. S. 422, 424;

Bluefield etc. Co. v. *Public Service Commission*, 262 U. S. 679, 683, 384;

Northern Pacific R. Co. v. *Department of Public Works*, 268 U. S. 39, 41, 42;

Live Oak Ass'n v. *Railroad Commission*, 269 U. S. 354, 356.

(7) Attached hereto is a copy of opinion rendered herein by the Supreme Court of the State of Illinois on April 20, 1938, affirming the order of the Circuit Court of Cook County, sustaining the order of the Commission.

Respectfully submitted,

THE ALTON RAILROAD COMPANY,
By SILAS H. STRAWN,
FRANK H. TOWNER,
Its Attorneys.

EXHIBIT "A".

Requisition Number 195501.

ILLINOIS SUPREME COURT.

Decided April 20, 1938.

THE ALTON RAILROAD COMPANY, *Appellant*,

v.

THE ILLINOIS COMMERCE COMMISSION *ex Rel.* MOULDING-BROWNELL CORPORATION ET AL., *Appellees*.

MR. JUSTICE ORR delivered the opinion of the court:

The Moulding-Brownell Corporation filed a petition with the Illinois Commerce Commission alleging that it was served by a switch-track in the city of Chicago connecting with the Chicago and Alton Railroad and that, although it was the duty of the railroad to maintain this track and to pay certain fees imposed by the city of Chicago, the railroad had refused to do so. Petitioners prayed for an order by the commission requiring the railroad to perform its obligations. Subsequently, the Alton Railroad Company filed a petition with the commission alleging that it did not own the track in question and was under no duty to maintain it. This petition asked the commission to rule that it might discontinue service over the track unless the Moulding-Brownell Corporation and the other industries served by it undertook its maintenance. The two cases were consolidated and after several hearings the commission, on March 24, 1937, ordered that the railroad maintain the track in question. This order was affirmed by the circuit court of Cook county and the case is here upon direct appeal under section 69 of the Public Utilities act. (Ill. Rev. Stat. 1937, chap. 111-2/3, par. 73.) The commission found that the power of the city of Chicago to impose a charge for maintenance of the track upon the city streets was not before it and hence made no order on that point. Thus we are not called upon to pass upon that issue.

The findings of fact made by the commission, which are not disputed by any of the parties, show that the construction of the switch-track involved in this proceeding, and the five spur-tracks leading from it, was begun some time before 1884, that except for 150 feet adjacent to the inter-section of the switch-track and the main line of the railroad, the tracks are located upon property owned by the four industries served, and that the original expense of building these tracks was borne by these companies. In 1904 the petitioning railroad entered into an agreement with the four industries located along this track whereby it agreed to assume the maintenance of the main switch-track, shown by the plat to be approximately 4000 feet in length. This agreement was performed by the railroad until March 26, 1936, when its receiver, appointed by a decree of a Federal court, elected not to continue the contract. The spur-tracks leading from the switch-track into the plants have always been maintained by the respective industries and no question as to their maintenance was raised by the petitions in this case. In 1934, an estimated gross revenue of $40,000 was received by the railroad from the industries served by the switch-track. It appears that the average "running repair" on the track has cost about $1000 per year, although the total outlay will be greater than that sum during the next few years, due to necessary replacements.

The only issue before us is whether a railroad can be compelled by the Illinois Commerce Commission to maintain a switch-track built by and upon the property of the industries served by the track. We have previously held that, as between the public and a railroad company, a switch-track built for industrial purposes and across public thoroughfares becomes a part of the main line of the railroad system which it joins and is subject to governmental regulation in the public interest even though it was built by private funds and for the most part on private property. (*Public Utilities Com.* v. *Smith*, 298 Ill. 151; *St. Louis, Springfield and Peoria Railroad* v. *Commerce Com.*, 309 id. 621; *Von Oven* v. *Chicago, Burlington and Quincy Railroad Co.*, 317 id. 334.) Petitioning railroad does not dispute the correctness of these decisions but contends that they merely determine its

duty as a public utility to the public at large. It argues that the duty of maintenance is an incident of the ownership of the track and that since it was under no duty to build the track in the first place and since it does not now own it, the burden of maintenance cannot be imposed upon it. This argument is incompatible with our repeated holdings that switch tracks of this type, once built, become a part of the main line of the railroad, whether built upon private rights-of-way or upon public streets. (*Von Oven* v. *Chicago, Burlington and Quincy Railroad Co., supra,* and cases cited.) It overlooks the fact that petitioning railroad uses this track for its own benefit to serve the industries located thereon, and, under the authorities above cited, may use the track, or extensions thereto, conveniently to serve other shippers and the public at large. The public, therefore, has an interest in the proper maintenance of this track quite apart from the interest of the parties to this suit. It was said by the Supreme Court of Wisconsin in *Union Lime Co.* v. *Railroad Com.*, 144 Wis. 523, 129 N. W. 605, that over such tracks "the products of the industry find their way into the markets of the world and every consumer is directly interested in the lessened cost of such products resulting from the building and operation thereof. That these products are supplied by a single owner, or by a limited number of owners, affects the extent and not the nature of its use—the track is none the less a part of the avenue through which the commodities reach the public. • • • Except that it (the railroad) is relieved of the initial cost of right of way and construction, the track stands in the same relation to it that any other portion of its track does. The owner of the industry obtains no interest in or control over it beyond that of being served by it equally with any one else who may desire to use it."

Section 50 of the Public Utilities act provides: "Whenever the commission, after a hearing had upon its own motion, or upon complaint, shall find that additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility • • • ought reasonably to

be made * * * to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements or changes be made, * * * in the manner and within the time and time specified in said order." This section is broad enough to impose a duty upon a railroad to maintain property which it uses for its own profit as well as that to which it has title, and, under the act, the commission has ample authority to enforce it.

Petitioning railroad contends, however, that because other industries in Chicago provide and maintain connecting spur-tracks at their own expense, the order of the commission in this case will result in discrimination. It appears, however, that such connections are similar in nature to the five spur-tracks leading from the switch track in question here. These connections have been, and apparently will continue to be, maintained by the individual companies to whose premises they lead. Hence no discrimination is apparent.

The order of the Illinois Commerce Commission was within its statutory power and does not violate any provisions of the State or Federal constitutions. The judgment of the circuit court of Cook County, sustaining the order of the commission, is affirmed.

Judgment affirmed.